92-763

No. 92-763

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
MIKE SHARP, and
DAN BULISHAK, - - - - - - Petitioners,

versus

JOHN W. HUTCHINSON, - - - Respondent.

Petition for Writ of Certiorari
From Denial of Discretionary Review
By the Kentucky Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is a State Trial Court under a duty to instruct on the two separate claims when a civil Complaint alleges both common law tort violations, and a claim for violation of the Plaintiff's Constitutional rights under 42 U.S.C. § 1983?

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v.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This case involves a civil Complaint brought by a college professor who was arrested and then assaulted by two policemen driving an unmarked car, dressed in casual street clothes, and without valid identification, for the purported offense of switching lanes in traffic.

Respondent sued in two theories: for the common law torts committed against him, and for the violation of his Constitutional right to be free from the infliction of summary punishment.

At the trial the Trial Judge was "non-acquainted" with the concept of concurrent jurisdiction or the lead cases in the area, stating at one point that it had not been decided

in Kentucky whether a Plaintiff could sue on his 42 U.S.C. § 1983 rights in the State forum (incorrect).

Respondent urged his Federal violation throughout the trial, and profferred precise Instructions as to same, but they were adamantly refused by the Trial Judge, who made the baffling remark that the only difference between the two separate claims in the case was the award of Attorney's fees.

Thus not adequately instructed, the jury returned a verdict for the policemen, which was immediately appealed by Respondent to the Kentucky Court of Appeals, which reversed on failure to instruct as proper, Discretionary Review then being denied by the Kentucky Supreme Court.

In their Statement of the Case, Petitioners herein (quite understandably) failed to apprize this Court that Respondent was in his own back yard, and was shown invalid identification by the police officers. Nor did Petitioners mention (once again quite understandably) that in addition to issuing a traffic citation, they knocked Petitioner unconscious, broke his glasses, destroyed his book bag, and occasioned the necessity for his further medical treatment.

SUMMARY OF ARGUMENT

As is of course quite apparent, the Complaint herein was sounded in two separate and distinct theories. The Civil Rights violations were clearly set out and pleaded in paragraphs 3, 4 and 5 of the Complaint.

It is simply beyond cavil that a party may sue for his/her Civil Rights violations in the State Courts: *Monroe* v. *Pape,* 365 U.S. 167 (1961); *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966); *Maine* v. *Thiboutot,* 448 U.S. 1, 65 L.Ed. 2d 555, 100 S.Ct. 2502 (1980).

In view of the settled state of the law on this issue, the Kentucky Appellate Courts ruled entirely correctly in this case, additionally stating authority from their own venue: *Scott* v. *Campbell County Board of Education,* Ky. App., 618 S.W.2d 589 (1981).

To be totally precise, the substantive right here relied on by Respondent, and for which the Instruction was refused, is the guarantee contained in the due process clause of the Fourteenth Amendment of the United States Constitution to be free from the infliction of summary judgment, a premise involving state of mind, and altogether different from any common law torts incident thereto, and the determination of the latter by a jury is simply *not* dispositive of the former.

ARGUMENT

Petitioners' first contention is that Respondent *had* no Federal substantive rights in the premises, and/or that he failed to prove same.

Both positions are incorrect, under our Constitution, and well-settled law.

Petitioners' second contention is that the Instructions given adequately covered both claims.

This is a preposterous position, and at variance with what happened in this case. As the record repeatedly and totally portrays, the Trial Judge obstinately refused to give *any* Instruction whatsoever on the Constitutional violation urged by the then-Plaintiff, now-Respondent.

Thirdly, Petitioners rely on the jury verdict of no excessive force by the police officers.

That is *not* the true issue here, nor does it somehow "supplant" the required consideration of the Respondent's claim for infliction of summary punishment (again, "state of mind"). Further, it misses the point of what these officers *continued* to do to Respondent, after they had him under arrest (in his own back yard, for the heinous offense, as claimed, of switching traffic lanes; one does not need a Third Eye to envisage the rage and hatred that must have been "officially" present at this point, nor to conclude the violence thereafter wreaked on Respondent, when he questioned the invalid identification papers).

For a fourth argument, Petitioners would urge that the jury's finding that the arrest was lawful totally abnegates any claim Respondent may have had for the infliction of summary punishment he endured during and after same.

Again, Petitioners are totally incorrect, as was the Trial Judge, in failing to distinguish the two entirely different claims asserted by Respondent in his suit against these two policemen.

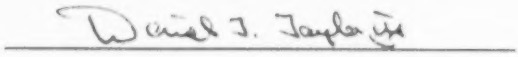
Ending with a whimper instead of a bang, Petitioners lastly aver that to allow a citizen to protest the infliction of summary punishment upon him will so derail our criminal justice system as to occasion societal breakdown.

The Respondent does not believe this innovative attitude requires rebuttal, among rational human beings.

CONCLUSION

Under the authorities, and the argument above set out, the Respondent asks this Court to deny its Writ of Certiorari in this cause.

Respectfully submitted this February 26th, 1993.



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